Dato' Manokaran Veraya v Perbadanan Pengurusan Apartmen Kayangan and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS C-02(NCVC)(W)-198–01 OF 2017 AND C-02(NCVC)(W)-393–03 OF 2017
LIM YEE LAN, SURAYA OTHMAN AND YEOH WEE SIAM JJCA
29 NOVEMBER 2018

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Land Law — Strata title — Common property — Whether management corporation ('MC') of stratified building owned the common property and had authority to deal with it as it deemed fit — Whether MC could only deal with common property in manner authorised by unanimous resolution of half the total number of apartment owners in general meeting as stipulated by s 42(2)(i) of the Strata Titles Act 1985 read with r 11(1) of the Second Schedule — Whether registered proprietor of strata unit could not refuse to pay maintenance/service charges on ground MC had failed to carry out its statutory duties in maintaining/managing the building — Strata Titles Act 1985 ss 42(1) and (2)

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The appellant owned a unit on the first floor of a block of apartments ('the building'). When the lobby and main entrance on the ground floor of the building was turned into a restaurant and mini-market, the appellant sued the owner and occupiers of the restaurant/mini-market for nuisance and trespass claiming that the noise, smoke and smell from the restaurant infiltrated into his apartment and made it impossible for him to live there. The appellant also sued the respondent for breaching its duty as the management corporation of the building in allowing the restaurant and mini-market to operate. The respondent counterclaimed for monies the appellant owed for service and maintenance charges, insurance, water charges and quit rent. In response, the appellant pleaded that the counterclaim should not be allowed as the respondent had not only breached its duties and obligations to properly maintain/manage the building and provide the necessary services but had cut off the electricity and water supplies to his unit for 11 years. In a consent judgment, the parties who were sued for owning/operating the restaurant/mini-market agreed to stop operating the restaurant. As for the appellant's claim against the respondent, the High Court determined it by holding that the construction of the restaurant and mini-market was illegal as the respondent did not own the common areas of the building and, therefore, the respondent had to restore the area to its original condition within three months at its own costs. The court dismissed the appellant's claim for damages; made no findings with regard to the claim for nuisance and allowed the respondent's counterclaim for payment of the arrears of service/maintenance charges. The court also rejected the respondent's contentions that it had

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obtained the approval of either the local authority or of the majority of the residents of the building to build the restaurant/mini-market. The instant appeals were: (a) by the appellant against the dismissal of his claim for nuisance and against the allowing of the respondent's counterclaim; and (b) by the respondent against the order that the common area construction had to be demolished and removed permanently.

Held, dismissing the appeals and affirming the decision of the High Court:

(1) Pursuant to s 42(1) and (2) of the Strata Titles Act 1985, which was the law in force at the time, the respondent, on becoming the management corporation ('MC') became the owner of the common property and, as proprietor thereof, the MC had powers similar to those conferred on other proprietors in respect of their land conferred by the National Land Code. The respondent was therefore at all times clothed with full authority to deal with the common property as proprietor, which necessarily included the authority to implement the common area construction in this case (see paras 27 & 31).

(2) Under the proviso to s 42(2)(i) of the Strata Titles Act 1985 (pre-amendment), read together with r 11(1) of the Second Schedule, a unanimous resolution was required for the MC to exercise its rights over the common property, meaning half (ie 45) of the total 89 registered proprietors in the building had to attend the general meeting ('AGM') to constitute a valid quorum and to unanimously vote for the conversion of the lobby area into the restaurant/mini-market. The minutes of the 15 June 2010 AGM, however, showed that only 21 proprietors attended and voted. There was no valid quorum to initiate a general meeting, not to mention to pass any resolution. The AGM was thus unlawfully convened and the resolution passed at the AGM was clearly illegal. The approval obtained by the respondent from the local authority to construct the restaurant and mini-market was a non-starter from the very beginning since the respondent had no right to even apply for it in the first place. Consequently, the decision of the High Court ordering the demolition of the restaurant and mini-market and to restore the lobby area to its original position was correct (see paras 32–34).

(3) The Strata Titles Act 1985 clearly stated that the registered proprietor (the appellant) was responsible for paying the maintenance charges regardless of whether he occupied his parcel or not. The appellant was not exempted from that responsibility on the mere reason that the respondent had failed to discharge its obligations diligently. If the appellant was dissatisfied with the respondent's failure to maintain the building, he could have sued the respondent for breach of its statutory duty but he could not evade his responsibility to pay the maintenance charges. There was also nothing in the sale and purchase agreement to

exempt the appellant from paying the maintenance charges if the respondent failed to carry out its duties in managing the building. The appellant's complaint regarding the respondent's failures was an afterthought as they only arose after the respondent had issued him a letter demanding payment of the outstanding charges (see paras 37–38).

(4) Not all interference with property was actionable under the law of nuisance. There had to be some appreciable harm, even in cases of property damage. A certain amount of noise was acceptable in an urban, modern society and intervention by injunction was only justified when the irritating noise caused inconvenience beyond what other occupiers in the neighbourhood could be expected to bear. Thus, the noise from the crowd in the lobby area was acceptable and not an actionable nuisance. The appellant could not expect a tranquil environment when he bought his unit on the first floor which was the nearest floor to the lobby area. He was not the only proprietor of the building and the increase in noise came with the increase in the crowd coming to the building every day. The law of nuisance was not sympathetic to a plaintiff who was extra/over sensitive. The courts would consider, among others, the duration, the intensity or the seriousness of the activity complained of. For the nuisance to be actionable, it had to be something which was more than temporary. In the instant case, the nuisance was temporary and had even ceased with the making of the consent order (see paras 44–45).

[Bahasa Malaysia summary

Perayu memiliki satu unit tingkat pertama sebuah blok apartmen ('bangunan tersebut'). Apabila lobi dan pintu masuk utama di tingkat bawah bangunan tersebut telah diubah menjadi sebuah restoran dan pasar mini, perayu telah menyaman pemilik dan penghuni restoran/pasar mini itu kerana kacau ganggu dan pencerobohan dengan mendakwa bahawa bunyi bising, asap dan bau daripada restoran itu menyusup masuk ke dalam apartmen dan menjadikannya mustahil untuk tinggal di situ. Perayu juga menyaman responden kerana melanggar kewajipannya sebagai perbadanan pengurusan bangunan tersebut kerana membenarkan restoran dan pasar mini itu beroperasi. Responden telah menuntut balas untuk wang perayu yang terhutang bagi caj perkhidmatan dan penyelenggaraan, insurans, caj air dan cukai pintu. Sebagai jawapan, perayu telah mempli bahawa tuntutan balas itu tidak patut dibenarkan kerana responden bukan sahaja melanggar kewajipan dan obligasinya untuk menyelenggara/mengurus bangunan tersebut sewajarnya dan memberikan perkhidmatan yang perlu tetapi telah memotong bekalan elektrik dan air kepada unitnya selama 11 tahun. Dalam penghakiman persetujuan, pihak-pihak yang disaman kerana memiliki/menjalankan operasi restoran/pasar mini itu bersetuju untuk menghentikan operasi restoran itu. Berhuhung tuntutan perayu terhadap responden, Mahkamah Tinggi menentukannya dengan memutuskan bahawa pembinaan restoran dan pasar

A mini itu menyalahi undang-undang kerana responden tidak memiliki kawasan awam bangunan tesebut dan, oleh itu, responden hendaklah memulihkan kawasan itu kepada keadaan asalnya dalam tempoh tiga bulan dengan kosnya sendiri. Mahkamah menolak tuntutan perayu untuk ganti rugi; tidak membuat apa-apa penemuan berkaitan tuntutan untuk kacau ganggu dan membenarkan tuntutan balas responden untuk bayaran tunggakan perkhidmatan/caj penyelenggaraan. Mahkamah juga menolak hujah responden bahawa ia telah memperoleh kelulusan sama ada pihak berkuasa tempatan atau majoriti penduduk bangunan tersebut untuk membina restoran/pasar mini itu. Rayuan-rayuan ini adalah: (a) oleh perayu terhadap penolaka tuntutannya untuk kacau ganggu dan terhadap kebenaran tuntutan balas responden; dan (b) oleh responden terhadap perintah bahawa pembinaan di kawasan awam itu hendaklah diroboh dan dialihkan secara kekal.

Diputuskan, menolak rayuan-rayuan itu dan mengesahkan keputusan Mahkamah Tinggi:

(1) Menurut ss 42(1) dan (2) Akta Hak Milik Strata 1985, yang merupakan undang-undang yang berkuat kausa pada masa itu, responden, setelah menjadi perbadanan pengurusan ('PP') telah menjadi pemilik harta bersama dan, sebagai pemilik harta bersama itu, PP mempunyai kuasa yang sama diberikan kepada pemilik lain berkaitan tanah mereka yang diberikan oleh Kanun Tanah Negara. Responden dengan itu pada setiap masa mempunyai kuasa penuh untuk berurusan dengan harta bersama itu sebagai pemilik, yang perlu termasuk kuasa untuk melaksanakan pembinaan harta bersama dalam kes ini (lihat perenggan 27 & 31).

(2) Di bawah proviso s 42(2)(i) Akta Hak Milik Strata 1986 (pra-pindaan), dibaca bersama k 11(1) Jadual Kedua, ketetapan (resolusi) yang sebulat suara dikehendaki untuk PP menggunakan haknya ke atas harta bersama itu, bermaksud separuh (iaitu 45) daripada jumlah 89 pemilik berdaftar dalam bangunan tersebut perlu menghadiri mesyuarat agung ('MAT') untuk membentuk korum yang sah dan untuk sebulat suara mengundi penukaran kawasan lobi kepada restoran/pasar mini. Minit MAT 15 Jun 2010, bagaimanapun menunjukkan hanya 21 pemilik hadir dan mengundi. Tiada korum yang sah untuk memulakan mesyuarat agung itu, apatah untuk meluluskan apa-apa ketetapan. MAT tersebut dengan itu adalah menyalahi undang-undang untuk diadakan dan ketetapan yang diluluskan di MAT itu jelas tidak sah. Kelulusan yang diperoleh oleh responden daripada pihak kuasa tempatan untuk membina restoran dan pasar mini itu bukan pemula dari awal lagi kerana responden tiada hak untuk memohon untuknya pada mulanya. Berikutan itu, keputusan Mahkamah Tinggi memerintahkan restoran dan pasar mini itu dirobohkan dan untuk memulihkan kawasan lobi itu kepada keadaan asalnya adalah betul (lihat perenggan 32–34).

(3) Akta Hak Milik Strata 1985 jelas menyatakan bahawa pemilik berdafar (perayu) adalah bertanggungjawab untuk membayar caj penyelengaraan tanpa mengira sama ada dia menghuni petaknya atau tidak. Perayu tidak dikecualikan daripada tanggungjawab tersebut hanya oleh kerana responden gagal melaksanakan obligasinya dengan tekun. Jika perayu tidak berpuas hati dengan kegagalan responden untuk menyelenggara bangunan tersebut, dia boleh menyaman responden kerana melanggar kewajipan statutorinya tetapi dia tida menglakkan tanggungjawabnya untuk membayar cak penyelenggaraan. Tiada juga apa-apa dalam perjanjian jual beli untuk mengecualikan perayu daripada membayar caj penyelenggaraan jika responden gagal untuk menjalankan kewajiannya dalam mengurus bangunan tersebut. Aduan perayu berkaitan kegagalan responden adalah suatu yang telah difikirkan kemudian kerana ia hanya timbul selepas responden mengeluarkannya surat menuntut bayaran caj tertunggak (lihat perenggan 37–38).

(4) Bukan semua campur tangan dengan hartanah boleh diambil tindakan di bawah undang-undang kacau ganggu. Perlu ada bahaya yang pasti, walau pun dalam kes kerosakan hartanah. Tahap bunyi bising tertentu boleh diterima dalam masyarakat bandar, moden dan campur tangan melalui injunksi hanya wajar jika bunyi yang menjengkelkan menyebabkan kesulitan melebihi apa yang penghuni lain dalam kejiranan boleh dijangkakan untuk ditanggung. Oleh itu, bunyi bising daripada orang ramai di kawasan lobi itu boleh diterima dan bukan kacau ganggu yang boleh diambil tindakan. Perayu tidak boleh menjangkakan persekitaran yang tenang jika dia membeli unitnya di tingkat pertama yang merupakan tingkat paling dekat dengan kawasan lobi. Dia bukan sahaja pemilik bangunan tersebut dan tahap bunyi daripada orang ramai yang datang ke bangunan tersebut setiap hari. Undang-undang kacau ganggu tidak bersimpati dengan plaintif yang terlebih/terlampau sensitif. Mahkamah akan mempertimbangkan, antara lain, jangka masa, keamatan atau keseriusan aktiviti yang diadukan. Untuk kacau ganggu boleh diambil tindakan, ia perlu berkaitan suatu yang lebih daripada sementara. Dalam kes ini, kacau ganggu tersebut adalah sementara dan telahpun terhenti apabila perintah persetujuan dibuat (lihat perenggan 44–45).]

Notes

For cases on common property, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5631–5647.

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

A *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)
Kennaway v Thompson and another [1980] 3 WLR 361, CA (refd)
Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577, FC (refd)
B *Sianglory Sdn Bhd & Ors v Mayor Bandaraya Kota Kinabalu & Anor* [2013] 7 MLJ 274, HC (refd)
Syarikat Perniagaan Selangor Sdn Bhd v Fahro Rozi Mohdi & Ors [1981] 2 MLJ 16, FC (refd)
C *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] Supp MLJ 363; [2010] 9 CLJ 785, FC (refd)

Legislation referred to

D Building and Common Property (Maintenance and Management) Act 2007 s 8, 8(2)(a)
National Land Code
Strata Management Act 2013
Strata Titles Act 1985 ss 4, 17B, 41A(1), 42, 42(1), (2), (2)(i), 45(1), (3), (4), (5), 52, Second Schedule, r 11(1), Third Schedule
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Appeal from: Civil Suit No 22NCVC-29–05 of 2014 (High Court, Kuantan)

MR Kumar (Moses Susayan and N Yohendra with him) (Netto & Yohendra) in Civil Appeal No C-02(NCVC)(W)-198–01 of 2017 for the appellant.
F *Ho Kok Yiew (Erin Woong with him) (Balendran Chong) in Civil Appeal No C-02(NCVC)(W)-393–03 of 2017 for the appellant.*
Ho Koko Yiew (Erin Woong with him) (Owee & Ho) in Civil Appeal No C-02(NCVC)(W)-198–01 of 2017 for the respondent.
G *MR Kumar (Moses Susayan and N Yohendra with him) (Netto & Yohendra) in Civil Appeal No C-02(NCVC)(W)-393–03 of 2017 for the respondent.*

Suraya Othman JCA (delivering judgment of the court):

INTRODUCTION

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[1] There are two appeals before us which were consolidated and heard together by virtue of this court's order on 25 April 2017. The appeals are as follows:

I (a) Appeal No C-02(NCVC)(W)-198–01 of 2017 ('Appeal 198'), appeal by Dato' Manokaran Veraya, who was the plaintiff in the High Court; and

(b) Appeal No C-02(NCVC)(W)-393–04 of 2017 ('Appeal 393'), appeal by Perbadanan Pengurusan Apartmen Kayangan who was the third defendant in the High Court.

[2] For ease of reference, parties will be referred to as they were in the High Court ie Dato Manokaran Veraya as the plaintiff and Perbadanan Pengurusan Apartmen Kayangan as the third defendant.

[3] The consolidated appeals emanate from the High Court's decision given on 13 December 2016. Appeal 198 is an appeal by the plaintiff against the High Court's decision in dismissing the plaintiff's claim against the third defendant for nuisance, and allowing the third defendant's counterclaim for the outstanding maintenance charges in the sum of RM56,578.79. As for Appeal 393, it is an appeal by the third defendant against the High Court's order that the existing common area construction be demolished and removed permanently.

BACKGROUND FACTS

[4] The plaintiff is the legal and beneficial owner of an apartment unit known as Unit No KY 1424 Kayangan Apartments, Genting Highlands, Pahang Darul Makmur ('the said apartment')

[5] In the original action, the plaintiff's claim was primarily against the first, second and fourth defendants, who were the occupiers/tenants of Unit KY 11424 as well as the fifth defendant, who is the owner of Unit KY 11424 ('relevant defendants'). The cause of action against the relevant defendants was premised on nuisance and trespass suffered by the plaintiff as a result of the conversion of a residential unit ('Unit KY 11424') into a restaurant ('restaurant').

[6] The claim against the relevant defendants was subsequently resolved by way of a consent order where the said relevant defendants agreed to cease operating the restaurant.

[7] The third defendant was brought into the original action on the allegation that it had breached its duty as the management corporation, purportedly for its failure and neglect to cause the said restaurant to cease operation. Subsequently, the third defendant instituted a counterclaim against the plaintiff, claiming for the payment of service and maintenance charges and other arrears.

[8] The plaintiff responded vide a counterclaim to the counterclaim of the third defendant, inter alia, pleading that the third defendant had allowed the lobby of Kayangan Apartments ('the building') to be unlawfully converted for commercial use ie the restaurant and a mini market.

[9] The denouement of the parties' claim and counterclaim against each

other was disposed of partly in favour of the plaintiff and partly in favour of the third defendant. The learned High Court judge ('learned judge') decided as follows:

(a) that the third defendant did not have the power to lawfully convert the common lobby of the building into a restaurant and mini market premises for commercial use and to derive an income from it;

(b) that the third defendant is ordered to restore the lobby area of the building to its original condition as per the sale and purchase agreement between the owner and developer;

(c) that the third defendant is to restore the main entrance of the building to its original condition as per the sale and purchase agreement between the owner and developer;

(d) that the third defendant is given three months from the date of the judgment to restore the lobby and main entrance of the building to its original condition;

(e) that all costs relating to restoring the lobby and the main entrances to its original condition is to be borne by the third defendant;

(f) that the plaintiff's claim for damages and exemplary damages is dismissed, and the court made no findings as regards to the plaintiff's claim for the tort of nuisance;

(g) that the third defendant's counterclaim for the plaintiff to pay the maintenance charges as of 16 August 2013 to the third defendant in the sum of RM56,578.79 inclusive of interest at 3%pa from the date of filing the counterclaim until full realisation, is allowed;

(h) that the third defendant's counterclaim for damages and exemplary damages against the plaintiff are not allowed; and

(i) that both parties are to bear their own costs.

FINDINGS OF THE HIGH COURT

[10] The findings of the learned judge in her grounds of judgment ('GOJ') can be summarised as follows:

(a) the third defendant's submission that they had obtained the authorisation to convert the common area in the building from the Bentong Municipal Council is doubtful;

(b) SD2 who was responsible in approving the third defendant's application, in his evidence in court, stated that his decision in approving such application was based on a complete reliance on the endorsement made by the architect, Puan Ruziati, as well as by looking at the plan;

(c) SD2 was completely in the dark on the fact that the third defendant's application, which was approved by him, was to convert the common area of the building into a restaurant and a mini market;

(d) SD2 failed to state the reason why he approved the third defendant's application. In other words, SD2 has approved the third defendant's application without knowing the valid reason in doing so;

(e) the assertion that the third defendant has obtained the support from the residents of the building in the annual general meeting ('AGM') held on 15 June 2010 for the conversion of the apartment into a restaurant was made without valid proof. What was proved was that on that date the residents were informed by the chairman of the approval given by the Bentong Municipal Council to convert the common area into a restaurant and a mini market;

(f) the third defendant had also failed to adduce any evidence to support its contention that the costs to construct the restaurant and the mini market were collected from the residents of the building to show that the residents were in full support of the conversion;

(g) there is no existing law that permits the third defendant to renovate and to convert the common area into a business premise with the intention to generate income from them;

(h) a common area as spelt out in s 8(2)(a) of the Building and Common Property (Maintenance and Management) Act 2007 (Act 663) is the area for the common use of the resident of the building, and not a property of the third defendant;

(i) the court is in agreement with the plaintiff's submission that the third defendant is in breach of the original sale and purchase agreement between the developer and the original purchaser, and the plaintiff, as the subsequent purchaser, is also subject to the terms of the original sale and purchase agreement;

(j) therefore, the third defendant is to restore the common area (ie the lobby and the main entrance) to its original position within three months from the date of the High Court's order; and

(k) upon perusing the sale and purchase agreement, the court also finds that there is no provision to exempt the plaintiff from paying the maintenance charges in the event that the third defendant failed to carry out its duty in managing the building.

A SUBMISSION OF THE PARTIES

The plaintiff's submission

B **[11]** The plaintiff contended that no maintenance/management and service charges ought to be paid to the third defendant as the third defendant had breached its duties and obligations to maintain/manage and to provide services to the said building and as such, the learned judge erred in ordering the plaintiff to pay maintenance and service charges, service tax, insurance, water charges, quit rent and interest in the sum of RM56,578.79 to the third defendant.

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[12] The plaintiff's pleaded case against the third defendant's counterclaim for the maintenance and related charges and the reasons for non-payment of the same, was primarily as follows:

D (a) as the third defendant had discontinued the supply of water and electricity to the plaintiff's apartment from the year 2003, the plaintiff could not inhabit the said apartment since then;

(b) that since the plaintiff was not able to occupy the said apartment by reason of the disconnection of the aforesaid utilities, the third defendant was not entitled to claim for any service charges against the plaintiff;

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(c) in any event, the third defendant did not maintain the building and had left it in a dilapidated, run down and filthy state;

F (d) in addition to that, the third defendant allowed part of the lobby area to be illegally converted into a restaurant and mini market;

(e) the third defendant had closed the main grand entrance of the building to accommodate the restaurant and mini market and had opened two small side entrances;

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(f) the third defendant also allowed twenty to thirty construction workers to occupy individual units in excess of the occupancy per unit allowed by law;

H (g) the restaurant and mini market are opened to the public and non-residents thereby compromising the security of the premises; and

(h) there is no maintenance of the common areas tenanted to the restaurant and mini market owners.

I **[13]** The plaintiff submitted that maintenance and service charges are calculated on the basis that the entire common area is to be maintained. In this case, the entire lobby had been tenanted out to the exclusive use of third parties and were therefore not maintained by the third defendant. This fact must be taken into account in the calculation of the maintenance and service charges

charged to the plaintiff. Upon a proper account being taken, it would be clear that the plaintiff is not liable to pay the sum of RM56,578.79 as claimed by the third defendant in their letter dated 26 August 2013.

[14] The plaintiff had pleaded the tort of nuisance at para 10 of the amended reply to the third defendant's defence. The plaintiff complained that because of the commercial use of the lobby, the lobby area is noisy and sometimes crowded. Further, the smell and smoke from the restaurant permeates the lift area and into the plaintiff's apartment which is located on the first floor.

[15] According to the plaintiff, the noise, smoke and smell from the restaurant was most acute in his apartment as his was on the first floor. The plaintiff therefore could not occupy his apartment even though he had spent over RM200,000 in renovating his apartment.

[16] The plaintiff also submitted that the learned judge erred in not making a finding that the acts of the third defendant in constructing the said restaurant and mini market had caused a nuisance in law to the plaintiff and consequently the learned judge erred in not ordering damages to be assessed as prayed for in the plaintiff's counterclaim.

[17] The approval by the local town council on the construction of the said restaurant and the mini market or even the resolution by the AGM are irrelevant in law to deprive the plaintiff of his rights to the common property, both under the Strata Titles Act 1985 and the sale and purchase agreement (executed between the developer and the original purchaser and which said agreement had been assigned to the plaintiff).

The third defendant's submission

[18] The third defendant, on the other hand, submitted that the learned judge had erred in holding that the common area construction did not fall within the duties and powers conferred upon the management body under the provisions of s 8 of the Building and Common Property (Maintenance and Management) Act 2007 (then in force), where such provisions are in fact non-exhaustive.

[19] The third defendant relied on the provisions of s 42(1) and (2) of the Strata Titles Act 1985 (Act 318) (pre-amendment, then in force) currently replaced/superseded by s 17B of the (amended) Strata Titles Act 1985. Section 42 deals with the ownership of the common property and the custody of the issue document of title. On that account, by virtue of the provisions of s 42(1) and (2), the third defendant is the proprietor of the common property.

[20] The third defendant also relied on the provisions of para 3 to the Third Schedule of the Strata Titles Act 1985 (Act 318) which provides for the powers of the management corporation over the common property. The third defendant insisted that the construction was legal since they had obtained the requisite approval for the common area construction vide the approval letter dated 16 February 2010 ('approval letter') issued by Majlis Perbandaran Bentong ('MPB') through one Encik Syed Mohd Nor bin Syed Jaafar, who had testified at trial as SD2. SD2 had duly testified and confirmed MPB's receipt of the third defendant application and MPB's issuance of the approval letter to the third defendant. It was the third defendant's submission that the learned judge had erred both in law and in fact when Her Ladyship saw it fit to disregard the approval so granted by MPB, by giving undue emphasis to material gleaned from the cross examination of SD2, ie material which suggested that SD2 may not have had complete personal knowledge of all aspects of the third defendant's application when SD2 had exercised his discretion to approve the same.

[21] The third defendant had dealt with the authorities in good faith and without any knowledge as to their internal proceedings and processes (or at least, there was no evidence or any suggestion that the third defendant had not dealt with the authorities in good faith). The learned judge was therefore wrong to have deliberated on the soundness of the internal decision-making process of MPB in issuing the approval letter to the third defendant. In addition, SD2 was not standing on trial on the correctness of the protocol or mechanics of how SD2, in his representative capacity of the local authority, came to give approval to the third defendant for the common area construction. The validity of the approval obtained from MPB, at all material times, was never an issue to be tried or was ever meant to require determination.

[22] The learned judge also held that at the third AGM, the apartment unit owners were merely 'informed' of the common area construction, as opposed to them having been approached for their 'approval'. In deriving this proposition, the third defendant submitted that the learned judge placed a misguided emphasis on the notion that the third defendant had sought and obtained the approval of the local authority (in February 2010) ahead of the approval from the apartment unit owners. The minutes of the AGM clearly showed that during the AGM, due approval from apartment unit owners were sought in respect of the proposal for the common area construction through a motion that was put to a vote, and that it was approved unanimously by those present and voting.

[23] It is further submitted by the third defendant that the learned judge had failed to appreciate and to give emphasis on the fact that the plaintiff did not attend the third AGM to object to the proposal for the common area

construction despite due notices to attend the third AGM having been sent out to all the residents of the building, including the plaintiff. As such, the plaintiff's failure to attend the third AGM and his failure to oppose the proposal during the third AGM would ordinarily translate to a waiver of his right to object to the common area construction. Accordingly, the plaintiff is equally estopped from raising his objections at this stage, a good three years after the common area construction had long been completed.

[24] The third defendant defended their action by submitting that there is nothing in the provisions of the relevant statutes that prohibit the third defendant from deriving lawful income from the common area construction to fund the maintenance of the building when the purpose of the same is for the benefit of the apartment residents.

[25] The third defendant argued that as the proprietor of the common property it possesses the rightful and needed authority to introduce future improvements or enhancements to the common property for the benefit of the apartment unit owners as a whole. What is equally important to note is that the complaint against the common area construction by the plaintiff was only introduced for the first time in the year 2013 after the developer had informed the plaintiff that the strata titles will not be released to his loan solicitors for purposes of perfection of the transfer and charge, unless and until the plaintiff had settled all arrears in his maintenance charges due and owing to Kayangan management corporation since the year 2003. The third defendant contended that it is settled law that evidence of laches, acquiescence and delay would tantamount to a waiver of the rights of a prospective litigant to take legal proceedings. Since no complaints were made by the plaintiff until a good three years after the common area construction had been completed, the complaint is nothing but an afterthought.

[26] The third defendant also submitted that the plaintiff's allegations of poor maintenance or non-maintenance by the management corporation is not a justification for non-payment pursuant to the statutory requirement.

DECISION OF THIS COURT

Conversion of common area into a commercial area

[27] In both appeals before us, it is not disputed that the construction of the restaurant and the mini market were approved by the relevant local authority. Be that as it may, it is inevitable for this court to delve into events preceding this approval. The position of the law at that time is governed by the Strata Titles Act 1985 (Act 318) (pre-amendment, then in force), which requires an

A authorisation in the form of a unanimous resolution from the parcel owners should any management corporation ('MC') decide to alter the current state of the common property area.

B **[28]** Section 4 of the Strata Titles Act 1985 (Act 318) defines 'common property' as follows:

> 'Common property' means so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan.

C **[29]** Section 42 of the Act, prior to the amendment, provides:

> (1) The management corporation *shall*, on coming into existence, *become the proprietor of the common property* and be the custodian of the issue document of title of the lot.
>
> D (2) The *management corporation shall have in relation to the common property the powers conferred by the National Land Code* on a proprietor in relation to his land:
> Provided that —
>
> E (i) except where it is specifically provided otherwise in this Act, those powers may be exercised *only on the authority of a unanimous resolution;* and
>
> (ii) the corporation shall not have power to transfer any portion of the common property which forms part of the building or of the land on
> F which the building stands. (Emphasis added.)

[30] *Paragraph 3 of the Third Schedule*, prior to the amendment, provides:

> The corporation shall control, manage and administer the common property *for the benefit of all the proprietors*:
> G
> Provided that the corporation may, by agreement with a particular proprietor, grant him exclusive use and enjoyment of part of the common property or special privileges in respect of the common property or part of it. (Emphasis added.)

H **[31]** From the above provisions, it is clear that the MC, on coming into existence, becomes the proprietor of the common property. The MC, by virtue of the provisions of s 42(1) and (2), as a proprietor, has powers similar to those conferred on other proprietors in respect of their land conferred by the National Land Code. Further, para 3 of the Third Schedule provides for the
I powers of the MC over the common property in that the MC shall control, manage and administer the common property. Consequently, the third defendant was therefore at all times clothed with full authority to deal with the common property as a proprietor in relation to its land, which necessarily included, in any event, such authority to implement the common area

construction. In this regard, the case of *Sianglory Sdn Bhd & Ors v Mayor Bandaraya Kota Kinabalu & Anor* [2013] 7 MLJ 274 is particularly instructive, wherein the court held that by virtue of the said provision, as the proprietor, the management corporation has the power to regulate what can be put on the common property. At pp 285–286, the court in *Sianglory* held as follows:

> [31] The ownership of common property is set out in s 15 of the Enactment clearly which states as follows:
>
> (1) The management corporation on its establishment shall become the owner of the common property and the custodian of the issue document of title to the land.
>
> (2) The management corporation shall have in relation to the common property the powers conferred by the provisions of the Land Ordinance on an owner in relation to his land ...
>
> [32] That simply means the second defendant is in control of the external walls of the Wisma Pendidikan and as custodian they have the power to regulate what can be put on the common property. That power of course is subject to what the owners of Wisma Pendidikan decide ...

However, under the proviso to s 42(2)(i), such powers may be exercised only on the authority of a unanimous resolution and under para 3 of the Third Schedule, for the benefit of all the proprietors.

[32] Having perused the minutes of the third AGM dated 15 June 2010, we found that the chairman of the AGM had informed the meeting that he had earlier obtained all the relevant approvals from the authorities on the construction work of the restaurant and the mini market which construction would commence in early July 2010. However, it was not stated in the minutes of the meeting that there was any approval sought from members of the meeting to convert the common area into a restaurant and a mini market. We also found that there was no objection recorded in the minutes of the meeting from any members opposing to the construction of the restaurant and the mini market.

[33] Under s 42(2)(i) of the Act, as stated earlier, a unanimous resolution is required for the MC to exercise its rights over the common property. The position of the law then, under the Strata Titles Act 1985, prior to the amendment, requires the attendance of half of the registered proprietors in the general meeting to constitute a valid quorum. Rule 11(1) of the Second Schedule states that, 'one half of the persons entitled to vote shall constitute a quorum at a general meeting'. It is undisputed that there are eighty nine proprietors of the apartments. This means that the minimum number of forty five proprietors must attend or be present in the general meeting to constitute a valid quorum and to unanimously vote their agreement on the conversion of the lobby area into a restaurant and a mini market to satisfy the requirements

of s 42(2)(i) on the unanimous resolution.

[34] On perusal of the minutes of the AGM, it showed that only twenty one proprietors attended and voted by poll at the AGM which was far from the minimum requirement of forty five. Twenty one proprietors do not form a valid quorum to initiate a general meeting, not to mention to pass any resolution. The AGM dated 15 June 2010 is thus unlawfully convened. The resolution thus passed in an unlawfully convened meeting is clearly illegal. There is no valid quorum since only twenty one out of forty five proprietors were present to vote to convert the common property (lobby) to a restaurant and a mini market, thus not satisfying the requirement of s 42(2)(i) of the Strata Titles Act for a unanimous resolution. Thus the approval obtained by the third defendant from the local authority to construct the restaurant and the mini market was a non-starter from the very beginning. This is so since the third defendant has no right even to apply for it in the first place. Therefore, the High Court's decision to order the demolition of the restaurant and the mini market and to restore the lobby area into its original position is a correct decision and we affirm that decision.

Maintenance charges

[35] The maintenance charges were from the years 2003 until 2014 and the law applicable then is the Strata Titles Act 1985 and not the Strata Management Act 2013 (Act 757), as contended by the plaintiff since the Act 757 only came into effect on 1 June 2015. The plaintiff contended that no maintenance/management and service charges ought to be paid to the third defendant as the third defendant had breached its duties and obligations to maintain/manage and to provide services to the said building and as such, the learned judge had erred in ordering the plaintiff to pay maintenance and service charges, service tax, insurance, water charges, quit rent and interest in the sum of RM56,578.79 to the third defendant. On perusal of s 52 of the Strata Titles Act 1985, it states that the MC of a building is empowered to charge maintenance charges on each registered proprietor, and if the proprietor refused to pay those charges, the MC can recover any sums due from each proprietor of a parcel, including the plaintiff, as a debt due to it.

52 The Recovery of Sum as Debt Due to Management Corporation

(1) *The payment of any amount lawfully incurred by the management corporation* in the course of the exercise of any of its powers or functions or carrying out of its duties or obligations *shall by virtue of this section be guaranteed by the proprietors* for the time being constituting the management corporation, *each proprietor being liable under such guarantee only for such proportion of the money so incurred as the share units of his parcel* or the provisional share units of his provisional block bear to the aggregate share units.

(2) Where any proprietor has not discharged or fully discharged his liability for the purpose of subsection (1), *the management corporation shall be entitled to recover from the proprietor* in any court of competent jurisdiction as a debt due to it? (Emphasis added.)

[36] Further, the statutory basis for the third defendant to collect maintenance charges is provided, inter alia, in ss 41A(1), 45(1), (3), (4), (5) and 52 of the Strata Titles Act 1985 which are as follows:

41A Determination of contribution payable during initial period.

(1) Where the first annual general meeting of a management corporation has not yet been convened, the proprietor of the parcels or provisional blocks, if any, in the subdivided building or land, whichever is applicable shall, commencing from the opening of the book of the strata register, pay to the management corporation any sum determined by the original proprietor as the contributions payable by the proprietors to the management fund of the management corporation.

45 Management fund.

(1) The management corporation shall establish a management fund sufficient in the opinion of the management corporation to meet the administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any other obligation of the management corporation.

(2) ...

(3) Subject to s 41A, for the purpose of establishing and maintaining the management fund the management corporation may at a general meeting:

(a) determine from time to time the amount to be raised for the purposes mentioned in subsection (1);

(b) raise the amounts so determined by levying contributions on the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks; and

(c) determine the amount of interest payable by a proprietor in respect of late contributions which shall not exceed the rate of ten per cent per annum.

(4) On application by or on behalf of a person who is a proprietor of a parcel, or by or on behalf of a prospective purchaser of a parcel that is offered for sale, or by or on behalf of the charge or prospective charge of a parcel, the management corporation shall issue to that person a certificate certifying:

(a) the amount determined, pursuant to subsection (3), as the contributions of that proprietor;

(b) the time and manner of payment of the amount determined by it pursuant to that subsection;

A (c) the extent, if any, to which the contribution has been paid;

(d) the amount (if any) then recoverable by the management corporation in respect of the parcel, pursuant to subsection (5) of s 43;

B (e) the sum standing to the credit of the management fund and the amount out of that fund committed or reserved for any expenses already incurred by the management corporation; and

(f) whether or not the management corporation has incurred any expenditure or is about to perfoRMany repairs, work or act in C respect of which a liability is likely to be incurred by the proprietor of the parcel under any provision of this Part and, if so, the estimated amount of the expenditure or the general nature of the repairs, work or act, and as against the management corporation and in favour of any person (including the member) relying in good faith on such certificate, that certificate shall be conclusive evidence D of the matters certified therein.

(5) Any contribution levied under subsection (3) in respect of a parcel shall be due and payable on the passing of a resolution to that effect by the management corporation and in accordance with the terms of that E resolution, and may be recovered as a debt from a proprietor of, or his successor in title to, the parcel.

52 The Recovery of Sum as Debt Due to Management Corporation

(1) The payment of any amount lawfully incurred by the management corporation in the course of the exercise of any of its powers or functions F or carrying out of its duties or obligations shall by virtue of this section be guaranteed by the proprietors for the time being constituting the management corporation, each proprietor being liable under such guarantee only for such proportion of the money so incurred as the share units of his parcel or the provisional share units of his provisional block G bear to the aggregate share units.

(2) *Where any proprietor has not discharged or fully discharged his liability for the purpose of subsection (1), the management corporation shall be entitled to recover from the proprietor in any court of competent jurisdiction as a debt due to it.*

H (3) Where for reasons of insufficiency of fund to meet the sum guaranteed under subsection (1), the management corporation may at an annual general meeting or at an extraordinary general meeting determine the amount to be contributed by each proprietor and decide any other issue or matter relating to the settlement of the said sum. (Emphasis added.)

I

[37] As stated earlier, the plaintiff argued that the third defendant has no right to charge him maintenance charges since he did not enjoy the benefits of the maintenance and services provided by the third defendant. The plaintiff submitted that he did not occupy his parcel from 2003–2014 since the third

defendant had failed to discharge its responsibility to maintain the building which was in a filthy and dilapidated state. Though it is not disputed by the third defendant that the building was not well maintained, it is unfortunate for the plaintiff that the position of the applicable law at the material time was not on his side. The provisions of the law, as stated above, were very clear in that the responsibility to pay the maintenance charges falls upon the registered proprietor, regardless of whether one occupied his parcel or not. The plaintiff, as the registered proprietor of his parcel was not exempted from his responsibility to pay the charges on the mere reason that the third defendant had failed to discharge its obligations diligently. If the plaintiff is dissatisfied with the third defendant's failure to maintain the building, he can always initiate a claim against the third defendant for breach of its statutory duty but he cannot, in the circumstances, evade his responsibility to pay the maintenance charges.

[38] Further, upon perusing the sale and purchase agreement, we also found that there is no provision to exempt the plaintiff from paying the maintenance charges in the event that the third defendant failed to carry out its duty in managing the building. It is to be noted that the plaintiff's complaint on the third defendant's failure only arose after the third defendant had issued a letter demanding such payment from the plaintiff. This showed that the plaintiff's complaint is an afterthought.

The tort of nuisance

[39] The learned judge had dismissed the plaintiff's claim for general and exemplary damages and made no finding with regards to the plaintiff's claim under the tort of nuisance. The learned judge had then ordered the third defendant to demolish the restaurant and the mini market. In view of this, and the fact that the evidence of nuisance was unrebutted, the plaintiff submitted that the learned judge had erred in not finding that the third defendant, in constructing the restaurant and mini market had caused a nuisance to the plaintiff and consequently to make an order for damages to be assessed as prayed for at para 21.5 of the plaintiff's counterclaim.

[40] The plaintiff complained that due to the commercial use of the lobby, the lobby area was noisy and sometimes crowded. Further, the smell and smoke from the restaurant permeates into the lift area and into the plaintiff's apartment which is located on the first floor. The plaintiff alleged that the noise, smoke and smell from the restaurant was most acute as his apartment was located on the first floor. Due to this, the plaintiff could not occupy his apartment even though he had spent over RM200,000 renovating his apartment.

[41] In considering whether the complaints are actionable, a reference to *Clerk and Lindsell on Torts* (12th Ed), at paras 1211 and 1213, which define nuisance as follows, is instructive:

> The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land ... Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land, when it is a private nuisance.
>
> The acts which constitute public nuisances are all of them unlawful acts. In private nuisance, on the other hand, the acts constituting the nuisance are not necessarily or usually unlawful. A private nuisance may be and usually is caused by a person doing on his own land something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extend to the land of his neighbour by (1) causing an encroachment on his neighbour's land, when it closely resembles trespass, (2) causing physical damage to his neighbour's land or buildings or works or vegetation upon it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.

[42] A case on point on nuisance from noise is the Federal Court's case of *Syarikat Perniagaan Selangor Sdn Bhd v Fahro Rozi Mohdi & Ors* [1981] 2 MLJ 16 where Chang Min Tat FJ, in delivering the judgment of the court, observed that a certain amount of noise in urban society is inevitable. His Lordship state:

> Noise in urban society there inevitably will be. Anyone living in town must expect to have to put up with a certain volume of noise from his neighbours and he, in turn, must have the right to make a certain amount of noise in the enjoyment of his property. But it is just as clear that no one has the right to create a volume of noise of such intensity and no one should be asked to put up with such a volume which by any reasonable standard becomes a nuisance.

[43] In *Kennaway v Thompson and another* [1980] 3 WLR 361 at p 366 Lawton LJ state that 'Intervention by injunction is only justified when the irritating noise causes inconvenience beyond what other occupiers in the neighbourhood can be expected to bear':

> Now nearly all of us living in these islands have to put up with a certain amount of annoyance from our neighbours. Those living in towns may be irritated by their neighbours' noisy radios or incompetent playing of musical instruments and they in turn may be inconvenienced by the noise created by our guests slamming car doors and chattering after a late party. Even in the country the mooing of a sick cow or the early morning crowing of a farmyard cock may interfere with sleep and comfort. Intervention by injunction is only justified when the irritating noise causes inconvenience beyond what other occupiers in the neighbourhood can be expected to bear. The neighbour who is complaining must remember, too, that the other man

can use his property in a reasonable way and there must be a measure of give and take, live and let live. A

[44] In our view, from the cases above, a certain amount of noise is acceptable in an urban, modern society and intervention, by injunction, is only justified when the irritating noise causes inconvenience beyond what other occupiers in the neighbourhood can be expected to bear. Thus, noises from the crowd in the lobby area is acceptable and not an actionable nuisance. Such noises are expected, especially when the plaintiff's unit is located on the first floor, which is the nearest floor to the lobby area. The plaintiff, in the circumstances, cannot expect a tranquil environment when he bought the apartment unit on such a floor. He is not the only proprietor of the building and the increase of sound (noises) will come with the increase of the crowd coming to the building everyday. In this respect, the law of nuisance is not sympathetic to a plaintiff who is extra/over sensitive, whether the sensitivity is related to the plaintiff himself or to his property. B C D

[45] The plaintiff had previously brought the restaurant operators into this suit and claimed for damages due to the nuisance from the smoke, noise and smell emanating from the restaurant. Parties had subsequently settled the matter and entered into a consent judgment where the restaurant operators (as defendants in the original suit) agreed to cease operating the restaurant. Be that as it may, the plaintiff pursued its claim for damages against the third defendant as MC for breach of its duty and for its failure and neglect in allowing the restaurant operators to operate the restaurant without restraining them. Regarding this issue, it is important to note that not every interference with a property will be actionable under the law of nuisance. In fact, there should be some appreciable harm, even in cases of property damage. This principle applies generally to all nuisance claims and the courts will consider, among others, the duration and intensity or seriousness of the activity complained of. Therefore, for the law of nuisance to be actionable, it should be something which is more than temporary. In our case, the nuisance was temporary and had ceased. E F G

[46] The plaintiff admitted that his parcel was vacant and unoccupied from 2003–2014. His reason was that he was prevented by the third defendant from occupying his unit when the third defendant cut off the electricity and water supply to his unit. From the evidence elicited, the third defendant's action was due to the plaintiff's failure to settle his arrears in maintenance charges. The plaintiff had never denied the non-payment of these charges. He was just disputing his responsibility to pay them. The alleged noise, smell and smoke that permeated from the restaurant were never the reasons why the plaintiff did not occupy his parcel. The plaintiff's unit was left vacant and unattended for a period of eleven years and it was not reasonable for him to expect that he can H I

just re-enter the unit in 2014, expecting the unit to look brand new.

[47] There was also no evidence adduced by the plaintiff to support his contention that the renovation works that he did to his unit was due to the effect of the smoke and smell emanating from the restaurant. The emission of smoke and fumes, noise, vibration and other forms of pollution into the atmosphere will not constitute actionable nuisance at common law unless it is proven that they are actually harmful to the plaintiff's property, or in some way affecting the reasonable enjoyment of it. The plaintiff had left his unit vacant for eleven years and logically, to make the unit habitable again, it is unavoidable for the plaintiff to do some restoration or renovation works. He certainly cannot put the blame on the third defendant when he was put to extra expenses due to his own doing. For these reasons, we are of the view that the plaintiff's claim against the third defendant for nuisance cannot be sustained.

[48] For the foregoing reasons, we find no merit in these two appeals to warrant our appellate intervention. The learned judge is not plainly wrong in coming to her decision to dismiss both appeals (see the cases of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] Supp MLJ 363; [2010] 9 CLJ 785; *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; and *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 on the plainly wrong principle). Accordingly, both appeals are dismissed and the High Court's decision is affirmed. We made no order as to costs and deposits are to be refunded to the respective appellants.

Appeals dismissed.

Reported by Ashok Kumar